Supreme Court, U.S.
FILED
JUN 6 1994
OFFICE OF THE CLERK

No. 93-1621

In the Supreme Court of the United States

OCTOBER TERM, 1993

JERRY D. HARDY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH D. DOVER
DOUGLAS ROSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether this Court should remand this case to the Merit Systems Protection Board to consider petitioner's factual contentions, not previously raised before the court of appeals or the Board, to support his claim that his demotion from his probationary supervisory position was invalid.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions and directive involved	2
Statement	2
Argument	5
Conclusion	8
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Carlson v. *Green*, 446 U.S. 14 (1980)	5
Link v. *Wabash R.R.*, 370 U.S. 626 (1962)	6
Pioneer Investment Services Co. v. *Brunswick Associates Limited Partnership*, 113 S. Ct. 1489 (1993)	5
Yee v. *City of Escondido*, 112 S. Ct. 1522 (1992)	5

Statutes:

Civil Service Reform Act:

5 U.S.C. 3321	2
5 U.S.C. 4303	2, 3, 1a
5 U.S.C. 4303(f)(2)	3
5 U.S.C. 7511-7513	3
5 U.S.C. 7512(C)	3

Miscellaneous:

Federal Law Enforcement Training Center Directive No. 64-00.A (Feb. 18, 1981)	2, 6, 7, 1a
Federal Personnel Manual, Ch. 315	4, 7

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1621

JERRY D. HARDY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 13 F.3d 1571. The initial decision of the administrative judge of the Merit Systems Protection Board (Pet. App. A17-A32) and the order of the Board denying review (Pet. App. A33-A35) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1994. The petition for a writ of cer-

tiorari was filed on April 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND DIRECTIVE INVOLVED

Pertinent provisions of the Civil Service Reform Act of 1978, 5 U.S.C. 3321 and 4303, and Federal Law Enforcement Training Center Directive No. 64-00.A (Feb. 18, 1981) are reproduced in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

1. On May 5, 1991, petitioner Jerry D. Hardy was promoted to the position of Chief of the Artesia Training Division at the Federal Law Enforcement Training Center, United States Department of the Treasury (FLETC). His formal appointment (SF-50) form notified him that the promotion was "subject to completion of [a] one year probationary period * * * beginning 05-05-91." Pet. C.A. App. 21.

Before the end of petitioner's scheduled work day on May 4, 1992, the last day of his one-year probationary period, Hardy was notified that he had been demoted from that supervisory position. The demotion letter informed him that he had been demoted because, among other things, "[y]our leadership style has become increasingly dictatorial[,] * * * [y]ou have been unable to develop and maintain open lines of communication or professional relationships[,] * * * [y]our initiative and resourcefulness have slipped to an unacceptable level [and] * * * [y]ou lack the enthusiasm and flexibility to appropriately guide the division." Pet. C.A. App. 22.

2. Petitioner appealed the demotion to the Merit Systems Protection Board (MSPB), claiming a right

to review under provisions of the Civil Service Reform Act (CSRA) granting employees who suffer a demotion a right to appeal. See 5 U.S.C. 4303 (demotions for unsatisfactory performance), 7511-7513 (specifying procedures for adverse personnel actions). However, the CSRA specifically precludes MSPB jurisdiction over appeals by probationary supervisory employees contesting their demotions. See 5 U.S.C. 4303(f)(2) and 7512(C).

To avoid the jurisdictional bar to his appeal, petitioner argued that he was no longer a probationary employee at the time of his demotion. He contended that his probationary period had actually ended at 10:00 a.m. on May 4 (the day of his demotion), before he received the demotion letter, because he had been approved for annual leave to begin at that time and to continue through May 5. Pet. App. A21-A22. He also contended that his 117 days of service as acting chief of the division prior to his appointment to that position should be applied towards his probationary period. *Id.* at A23-A25. The administrative judge rejected both arguments, noting that the grant of annual leave does not imply that a new tour of duty has been set (*id.* at A21), and that the Federal Personnel Manual (FPM) does not require agencies to count periods of acting service in supervisory positions towards completion of the probationary period (*id.* at A24-A25). The full MSPB denied review. *Id.* at A33-A34.

3. The court of appeals affirmed. Pet. App. A1-A16. The court agreed with the MSPB that "[petitioner's] taking of annual leave did not alter the fact that he was regularly scheduled to work until 5:00 p.m. on May 4, the day before his anniversary date." *Id.* at A6-A7. The court also rejected petition-

er's contention that FLETC was required, under FPM Chapter 315, Subchapter 8, to apply his 117 days of service as acting chief towards completion of his probationary period as chief of the division. Pet. App. at A7-A8. The court held that the more specific provisions of Subchapter 9, covering probation on initial appointment to a supervisory position, applied rather than Subchapter 8, which covers probationary appointments generally. Pet. App. A9. Subchapter 9 grants agencies discretion in counting acting service, providing only that "[a]gency policy *may* provide for the crediting of temporary service in a supervisory or managerial position" towards the completion of the probationary period. Pet. App. A10 (emphasis added). FLETC policy, providing that "[t]emporary service as a supervisor" counts towards the completion of the probationary period only if the temporary service was in excess of 120 days, *id.* at A11 n.4, did not cover petitioner, who had served as acting chief for 117 days. Therefore, the court of appeals affirmed the MSPB's conclusions that petitioner was still a probationary employee when he was demoted, and that the MSPB had no jurisdiction over his appeal. *Id.* at A2.[1]

4. Since the court of appeals' decision, petitioner has hired a new attorney, who raises new factual arguments not made before either the MSPB or the

---

[1] The court of appeals also rejected petitioner's contention (Pet. App. A13-A15), as had the administrative judge (*id.* at A25-A26), that his demotion did not actually occur until after the completion of his probationary period. This contention was based on the fact that petitioner did not receive paperwork on his demotion until June, 1992, and that he continued to be paid the salary of the higher grade in the interim.

court of appeals, and who asserts that this case should be remanded to the MSPB to consider these new arguments. Specifically, petitioner contends that, because petitioner's probationary period fell during a leap year, the end of that period actually occurred on May 3, 1992, the 365th day of the probationary period and the day before he was demoted, and not May 4, 1992, the day before the anniversary date of his service. Pet. 4-5. Petitioner also contends that FLETC should have counted his previous service in a supervisory position in the General Services Administration towards the one-year period. Pet. 5-6.

ARGUMENT

1. Petitioner concedes that he is raising new factual arguments that his attorney failed to raise below, and he does not contend that the court of appeals or the Board incorrectly resolved any of the issues that he presented to them. This Court ordinarily will not consider a claim not raised or addressed below. *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992). The petition presents no important or recurring issue, and no interests of judicial administration would be served by permitting petitioner to raise the arguments here for the first time. Cf. *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980).

Petitioner nevertheless asserts that the interests of justice require that this case be summarily remanded to the MSPB. Pet. 4. However, as recently as last year, this Court reiterated that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Investment Services Co.* v. *Brunswick Associates Limited Partnership*, 113 S. Ct. 1489, 1499 (1993). The considerations underlying this prin-

ciple were set forth by this Court more than thirty years ago:

> There is certainly no merit to the contention that dismissal of [petitioner's] claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Link v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962). As *Link* makes clear, petitioner is not completely without a remedy: "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." *Id.* at 634 n.10.

2. This case does not present any compelling circumstance warranting the remand that petitioner seeks. Petitioner contends that FLETC should have counted his prior service in a probationary position at the General Services Administration. But FLETC Directive No. 64-00.A (Feb. 18, 1981), governing probationary periods for newly appointed managers and supervisors, makes clear that the time for petitioner to make this argument was when he was appointed, not when he was terminated. Section 7.a of that Directive provides in pertinent part:

> Applicability of the probationary period requirement to the individual as it relates to this

> directive is a [FLETC] determination. In the absence of records which clearly support an individual's claim that he or she should be exempt from the requirement because of previous service in a supervisory or managerial position, [FLETC] can require the individual to serve a probationary period. An employee who believes he or she has served in a sup rvisory or managerial position as defined by this directive and who wishes to contest [FLETC's] determination may do so under [FLETC's] grievance procedure. By regulation, there is no right of appeal to the Merit Systems Protection Board.

Petitioner's remedy, therefore, was to invoke FLETC's grievance procedure when FLETC required him to serve a probationary period as a supervisor.

As for petitioner's leap year argument, we have found nothing in the FPM that specifically addresses this issue, nor have we found any other authority that bears directly on it. The court of appeals noted that, under an earlier version of the FPM, an employee's "one year probationary period ends on the completion of the employer's tour of duty on the last day before the *anniversary date* of the employee's appointment." Pet. App. A5 (emphasis added). Although it is not clear that this provision governs petitioner's case,[2] it does tend to suggest that the "year"

---

[2] Chapter 315, Subchapter 8 of the FPM was amended by the Office of Personnel Management on February 18, 1992, during petitioner's probationary service, and the section cited by the court of appeals no longer appears in the FPM. Moreover, as the court of appeals also noted (Pet. App. A9), the more specific provisions of Subchapter 9 cover probationary service in supervisory positions. We are not aware of any provision in Subchapter 9 specifically addressing the leap year issue.

of probationary service is a calendar year, not 365 days. There is no apparent reason, moreover, why petitioner could not have raised this argument below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH D. DOVER
DOUGLAS ROSS
Attorneys

JUNE 1994

APPENDIX

1. Section 303(a) of the Civil Service Reform Act of 1978 as amended, 5 U.S.C. 3321, provides in pertinent part:

(a) The President may take such action * * * as shall provide as nearly as conditions of good administration warrant for a period of probation—

* * * (2) before initial appointment as a supervisor or manager becomes final.

(b) An individual—

(1) who has been transferred, assigned, or promoted from a position to a supervisory or managerial position, and

(2) who does not satisfactorily complete the probationary period under subsection (a)(2) of this section, shall be returned to a position of no lower grade and pay than the position from which the individual was transferred, assigned, or promoted.

2. Section 203(a) of the Civil Service Reform Act of 1978 as amended, 5 U.S.C. 4303, provides in pertinent part:

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance. * * * * *

(f) This section does not apply to—

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title.

3. Section 7 of Department of the Treasury Federal Law Enforcement Training Center Directive No. 64.00.A (Feb. 18, 1981) provides:

a. Applicability of the probationary period requirement to the individual as it relates to this directive is a Center determination. In the absence of records which clearly support an individual's claim that he or she should be exempt from the requirement because of previous service in a supervisory or managerial position, the Center can require the individual to serve a probationary period. An employee who believes he or she has served in a supervisory or managerial position as defined by this directive and who wishes to contest the Center's determination may do so under the Center's grievance procedure. By regulation, there is no right of appeal to the Merit Systems Protection Board.

b. Temporary service as a supervisor or manager immediately prior to the effective date of the probationary period requirement counts in the same way as service under a permanent appointment provided the individual was officially assigned to the position, e.g., a temporary appointment, promotion, or reassignment, for a period in excess of 120 days. Service while on detail or in an acting capacity during the temporary absence of the regular supervisor or manager, does not count.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 301157 86162